No. 3080

United States

Circuit Court of Appeals

For the Ninth Circuit

SKAGIT COUNTY, a Public Corporation of the State of Washington,

Plaintiff in Error.

VS.

PUGET MILL COMPANY, a Corporation,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

A. R. HILEN,
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STATEMENT OF THE CASE

The defendant in error, Puget Mill Company, is a corporation organized under the laws of the State of California and licensed to transact business within the State of Washington. During the year 1915 it owned certain timber lands in Skagit County, Washington, said county being the plaintiff in error herein. The board of equalization of said County for the year 1915, believing that the lands of defendant in error were assessed too low, directed it to appear before said board to show cause why such taxes should not be raised, such direction being contained in the notice known as Exhibit "B" to the complaint of defendant in error. (Transcript, page 9.) The defendant in error chose to ignore the notice sent and the taxes on the land in question were accordingly raised. Thereafter defendant in error paid such taxes under protest and then presented its claim to said county for the excess over the old assessment. The claim of defendant in error being denied it brought this suit to recover such excess and was successful in the court below, the trial court holding that inasmuch as the notice to appear before the board of equalization did not fix a day certain for appearance that therefore such notice was void and the board was without jurisdiction to make the increase in assessment. Such judgment the county as plaintiff in error has brought to this court for review by writ of error.

ASSIGNMENT OF ERROR

I.

The Court erred in holding that the complaint in the above entitled cause, stated facts sufficient to constitute a cause of action, and in rendering the judgment on the evidence adduced supporting the said complaint.

II

The Court erred in holding that the notice to appear before the Board of Equalization of Skagit County, directed to defendant in error and made a part of the complaint of said defendant in error, and designated therein as Plaintiff's Exhibit "B" was insufficient in law, for the reason that no definite time and date of appearance before said Board of Equalization, was contained in said notice.

III

The Court erred in its judgment, that by reason of the failure to designate a definite date of appearance before the Board of Equalization of Skagit County, on the part of defendant in error as stated in the foregoing second assignment of error, the said Board of Equalization was without jurisdiction to raise the taxes of defendant in error in the amount complained of or to fix taxes in any amount greater than that fixed by the assessor of Skagit County, Washington.

IV.

The Court erred in its judgment that the defendant in error, do have and recover from the plain-

tiff in error, the sum of $7,313.86, with interest on said sum from August 7, 1916, or in giving or granting unto the said defendant in error, judgment for any sum or sums whatsoever.

ARGUMENT

The facts in this case are admitted by plaintiff in error to be correctly set forth in the complaint. It is true that some parts of the complaint are denied by answer but on the trial plaintiff in error abandoned such denial and contented itself with urging that the admitted facts presented no legal cause of action. The only question before this court, therefore, is whether the complaint states facts legally sufficient to support a judgment. We have, therefore, prepared no bill of exceptions, relying on the well-established rule that where the only error urged is that the complaint is legally insufficient to support a judgment, a bill of exceptions is unnecessary and such question may be raised for the first time on appeal.

> Slocum v. Pomeroy, 6 Cranch. 221; 3 Law Ed. 204.
>
> Kentucky Life & Acc. Co. v. Hamilton, 63 Fed. 93.
>
> City of Wilmington v. Ricawd, 90 Fed. 212.
>
> Western Union Telegraph Co. v. Sklar, 126 Fed. 295.

We proceed then with our argument that the complaint states no cause of action at all. The only

question in issue is whether the notice to appear before the board of equalization was sufficient to give the board jurisdiction to raise the taxes of defendant in error. Such notice accurately set forth in the complaint, was as follows:

"BOARD OF EQUALIZATION,
Skagit County, Washington.
Mt. Vernon, Washington, July 3, 1915.

Puget Mill Company,
Seattle, Washington.

Gentlemen:

You are hereby notified to be and appear before the Board of Equalization of Skagit County, Washington, and show cause, if any you have, why the assessed valuation on the property, as per annexed schedule, shall not be raised from the items marked "present valuation" in said schedule to the items under the title "raised to" in said schedule. And you are hereby notified that if you fail, neglect, or refuse to so appear or fail to show good and sufficient cause why said proposed raise should not be made, then the said board will proceed to make such raise in assessed valuation on property as specified in said schedule.

"You are further notified that the said Board of Equalization for the year 1915 will be and remain in session in the Commissioners' rooms at the court house in Mount Vernon, Skagit County, Washington, between the hours of

9 o'clock in the forenoon and 4 o'clock in the afternoon of each and every Monday, Tuesday and Wednesday during the first three weeks in August, and will also be in session between the same hours as stated, on Saturday, of the third week in August, being the 21st of said month, which day will be the last day of said month, which day will be the last day of said session.

"Very truly yours,

"J. Z. NELSON,

"County Assessor and Ex-officio Clerk of the Board of Equalization of Skagit County, Washington."

The statute under which the notice was given is as follows:

"Section 9200. The county commissioners, the county assessor and the county treasurer, or a majority of them, shall form a board for the equalization of the assessment of the property of the county. They shall meet in open session for this purpose annually on the first Monday in August at the office of the county assessor, who shall act as clerk of said board, and, having each taken an oath fairly and impartially to perform their duties as members of such board, they shall examine and compare the returns of the assessment of the property of the county and proceed to equalize the same, so that each tract or lot of real property and each article or class of personal porperty shall

be entered on the assessment list at its true and fair value, according to the measure of value used by the county assessor in such assessment year, and subject to the following rules:

"First: They shall raise the valuation of each tract or lot or real property which in their opinion is returned below its true and fair value to such price or sum as they believe to be the true and fair value thereof, after at least five days' notice shall have been given in writing to the owner or agent." Session Laws of the State of Washington for 1915, Page 343. Chapter 122.

The District Court held the notice insufficient for the reason that it fixed no day certain for the appearance of defendant in error, basing his judgment upon the Washington case of Everett Water Co. v. Fleming, 26 Wash. 364, and applying the rule that the Supreme Court of a state having construed a section of that state's statute law, such construction is binding on the Federal Courts. It is our contention that in the Everett Water Co. case, supra, the Supreme Court indulged in obiter remarks in giving the construction relied upon by defendant in error and consequently the case falls within the exception to that rule and the Federal Court is not bound thereby.

The proposition is so firmly established that obiter in the decision of a State Supreme Court in construing a statute of that state is not binding on the Federal Courts in dealing with questions un-

der such statute, that we call attention to but few of the many authorities available. Carroll v. The Lessee of Carroll et at., 57 U. S. 275; 16 Howard 275; 21 Curtis 128; appears to be the leading case upon this matter. Justice Curtis, speaking for the Supreme Court of the United States, therein says:

> "If the construction put by the court of a state upon one of the statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs.
>
> "And therefore this court and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties. In Cohens v. The State of Virginia, 6 Wheat. 399, this court was much pressed with some portion of its opinion in the case of Marbury v. Madison and Mr. Chief Justice Marshall said: 'It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond

the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' ''

This case has been followed in a number of other decisions rendered by the Supreme Court of the United States. We call attention particularly to the case of St. Louis V. & T. H. R. Co. v. Terre Haute & I. R. Co., 145 U. S. 393, where the court said:

> ''Upon questions discussed in the opinion and not necessary to the judgment, or not considered at all, the case cannot be regarded as a decision.'' * * * citing Carroll v. Carroll, supra.

Matz et al. v. Chicago & A. R. Co., a Federal case in the Circuit court for the Western Division of Missouri, reported in 85 Federal, page 180, is a case very much in point. The decision quotes Carroll v. Carroll, supra, and likewise St. Louis V. & T. H. R. Co. v. Terre Haute & L .R. Co., supra, and holds expressly that a Circuit Court of the United States is not bound to follow the obiter remarks of a State Supreme Court rendered in a decision wherein the same state statute which is before the Federal Court is construed.

These cases give a clear statement of the rule for which we are contending and they likewise lay down the test of what constitutes obiter, to-wit: "Any part of an opinion which was not needful to the ascertainment of the right or title in question between the parties" (Carroll v. Carroll, supra) and "Questions discussed in the opinion and not necessary to the judgment" (St. Louis, etc. R. Co. v. Terre Haute, etc., supra). Bouvier defines obiter dicta as follows: "An obiter dictum is an opinion expressed by the court, but which, not being necessarily involved in the case, lacks the force of an adjudication." 1 Bouv. Law Dict. 476. An editorial footnote to the case of Carroll v. Carroll, supra, gives this statement concerning obiter: "According to the more rigid rule, an expression of opinion, however deliberate, upon a question however fully argued, if not essential to the disposition which was made of the case, may be regarded as a dictum, or an obiter dictum." 1 Abbott, N. Y. Dig. pref. IV.; See 17 Serg. & R. 292; 1 Phill. Ecc. 406; 1 Eng. Eccl. 129; Ram. Judgm. c. s. p. 36; Willes, 666; 1 H. Bh. 53-63: 2 Bos. & P. 375; 7 Penn. 287; 3 Barn. & Ald. 341; 2 Bingh. 90.

The question then resolves itself to this: Is the expression of the Washington court relied upon by defendant in error and which the lower court held himself bound to follow, "necessarily involved in the case," or "essential to the disposition which was made of the case." We believe that a close reading of Everett Water Co. v. Fleming, supra, shows

clearly that this question must be answered in the negative.

As stated in that case the only question involved was the sufficiency of the notice given by the Board of Equalization to the Everett Water Company. This notice reads as follows:

"Everett, Wash., 16th August, 1901.

"General Manager Everett Water Co.,

"Everett, Wash.

"Dear Sir:

"You are hereby notified to appear before the Board of Equalization within five days from the date of this notice and show cause, if any, why the personal assessment of your company for the year 1901, should not be raised from $42,865 to $150,000. Board will be in session from the 19th to the 24th of this month.

"Yours truly,

(SEAL) "W. H. ROSS."

"County Auditor and Clerk of Board of Equalization."

26 Wash. 367.

After discussing a matter pertaining to the mailing of notice the court in that case says: page 366:

"But the judgment of the lower court would have to be affirmed in any event in this case for the reason that the requirements of Section 1714, in relation to the notice, have not been met. It is asserted by the appellants, and is probably shown by the record, that the re-

spondent received the notice, which was mailed on August 16th, on August 17th; that when so received it became actual notice, and that, therefore no constructive notice or notice by mail was necessary. This is probably true but the statute requiers that **at least five days' notice must be given.** Paragraph 3 of Section 1714, is as follows:

'They shall raise the valuation of each class of personal property which in their opinion, is returned below its fair and true value to such price or sum as they believe to be the true and fair value thereof. And they shall raise the aggregate value of the personal property of each individual whenever they believe that such aggregate value is less than the true valuation of the taxable personal property possessed by such individual to such sum or amount as they believe to be the true value thereof, after at least five days' notice shall have been given in writing to the owner or agent thereof.' ''

The court then proceeds with its opinion as follows: (page 367)

''It will be observed that the statute provides that this action shall be taken after at least five days' notice shall have been given to the owner, and the notice calls upon the company to appear **within** (italics by the court) five days from the date of the notice. So it would seem that in any event the statutory notice, without which the valuation cannot be raised.

and which is a jurisdictional prerequisite, was not given."

When the court so expressed itself the case was decided. All else in the case might well "have been decided either way without affecting any right brought into question" as was a test of obiter mentioned in the Carroll case, supra: "Then," as there stated, "an opinion on such a question is not a decision." The court had said all, and had passed upon all, that was necessary for a judgment. Consequently when the Washington court goes on to say that the statute contemplates that a notice must be given which fixes a specific day certain for a property holder's appearance and that he is not compelled to be in constant attendance upon the board of equalization during its entire session, it is clear, under the tests above quoted and the authorities cited, that the court's opinion was obiter dictum in that regard and is not binding on this court. The notice had already been deemed insufficient and as the court expressed it, the "jurisdictional prerequisites" had not been established; after that, a discussion of the inherent requirements of a notice to property owners became unnecessary for a determination of the case then before the court.

It is quite apparent that counsel themselves have not an over-abundance of faith in their own contention for rather than put the question squarely to the Washington Supreme Court and let that court either affirm or modify their obiter remarks in this Everett case, they have chosen to seek safety

in the Federal Court by invoking the doctrine that the statute having been already construed by the State Court the hands of this court are tied so far as the merits of the case are concerned. We have seen, however, under ample authority, that the doctrine which they so conveniently seek as a shield renders them no succor. We proceed therefore, to deal with the case upon its merits and contend that the notice given by the Board of Equalization of plaintiff in error was a sufficient notice under the Washington statute.

It will be readily seen that the notice in the case at bar does not have the inherent defect found in the notice given in the Everett case, namely that the notice there called the owner to appear **within** five days from the date of the notice whereas the statute provides that the value of property can be raised only after "at least five days" notice shall have been given in writing to the owner." Chapter 122, Session Laws 1915, supra. The board did not convene, as stated in the notice, supra, until the first Monday in August, to-wit: August 2, 1915, more than five days after the notice was given.

It is mentioned in the Everett case, supra, and relied upon by the lower court, that a day certain should have been set upon which the defendant in error could have appeared and opposed the raising of its taxes. It is difficult to conceive what valuable right defendant in error has lost or wherein it could be prejudiced in any manner by the notice sent out by the board. The notice set forth the days

upon which the board would be in session and extended to defendant in error an invitation to come before that board at any time during any of such days and the board would hear it. The time of the meeting was fixed in the notice; the place of the meeting was fixed. Instead of being tied down to a specific day and hour the board had been more liberal with defendant in error and has conceded it the right to appear at a time of its own choosing. When defendant in error failed to avail itself of that right and did not appear at all, how is it in a position to say that the notice given is improper?

The notice given is the customary notice which for years has been sent out by all counties in the State of Washington. It does not differ materially from the notices sent out by counties in other states. In fact, from the very necessity of circumstance no other kind of a notice could be given. The court must recognize the fact that a county is a great business institution, second in size and importance only to the state; one of its chief functions is the assessment and collection of taxes. It must be judicially recognized that in a county there are thousands of property owners whose taxes may be adjusted. A liberal notice to such owners requesting them to appear before the board of equalization if they wish to be heard on such readjustment is absolutely essential to the administration of the business affairs of the county. In fact, some of our states have by statute provided that notices of this character need not be sent personally to each property owner, but

the notice may be given generally by publishing a blanket notice setting forth the time during which the board will meet. The courts have not hesitated to declare such statutes constitutional and sanction such a practice.

State ex rel Jennings Bros. Inv. Co. v. Armstrong et al, 56 Pac. 1076 (Utah.)

Streight et al. v. Durham, 61 Pac. 1096 (Okla.)

Why, then, should defendant in error be heard to complain when instead of being denied a right, it has in fact been extended a privilege which it would not have were the narrow view of the statute contended for by it to pervail? If a day and hour certain must be set at which time a taxpayer must appear and fail not at his peril he could no longer appear at his own convenience, but must come at the board's order. It is usually when some right or privilege is withdrawn that a party is heard to complain, not when a privilege is extended.

Moreover, were the court to hold that the notice must set a day certain for each property owner, or the notice given would be void under the statute, the court would be requiring the impossible of the county. The court would be giving to the statute an interpretation which would make the statute inoperative, would render it meaningless and absurd. The taxing statutes of the State of Washington require the Board of Equalization to be in session for a minimum of not less than three days and a maximum of not more than three weeks. Rem. & Bal.

Code, Section 9201. Under the laws of the State of Washington the state has established a day of eight hours duration in all state and county work. Rem. & Bal. Code, Sec. 6572. We would have, therefore, the anomalous situation of a great business organization wherein there may be thousands of property owners to be notified to appear for a readjustment of taxes, each having a day certain set for his appearance and the statute limiting the time of the sitting of the board to 144 hours. There are not minutes enough in the allotted time to give each property owner his "day in court" without cutting the time allotted to each to such an extent that a hearing of any kind would be impossible. That a court will not give an interpretation rendering a statute meaningless or inoperative when another interpretation would give it meaning is so elemental a rule of statutory interpretation that no citation of authority for its support is necessary.

In actual practice of course but a small proportion of the taxpayers actually appear in response to the notice and by proceeding in the customary way as was done in the case at bar the work of equalization can be conveniently taken care of for all concerned. If the present judgment is to stand and the board be restricted in each particular case to the few moments that it will be possible to allot to each taxpayer when the notices are given, then the legislature has demanded the impossible and the statute is merely an ornament.

We reluctantly confess that a most exhaustive

search has failed to reveal any judicial expression on the problem presented except the inadvertent obiter remark of the Washington court in the case cited. We believe, however, that a careful consideration of the notice in the case at bar will convince the court that it is the only practicable form of natice that can be given if the statute is to have life and that instead of denying defendant in error a right it in fact extended a privilege. We therefore respectfully ask that the judgment of the District Court be reversed.

Respectfully submitted,

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